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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE JOSEPH RIVERA,

Defendant and Appellant.

E063917

(Super.Ct.No. INF1202934)

OPINION

APPEAL from the Superior Court of Riverside County. Graham A. Cribbs, Judge.  
(Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Richard De La Sota, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew  
Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendant Eddie Joseph Rivera of attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (e)<sup>1</sup>; count 1); felon in possession of a firearm (§ 29900, subd. (a); count 3); felon in possession of ammunition (§ 30305, subd. (a)(1); count 4); attempted robbery (§§ 211, 664; count 5); and robbery (§ 211; count 6). The jury found as to count 1 that he personally and intentionally discharged a firearm. (§ 12022.53, subd. (c).) Defendant was also found to have three prior strike convictions (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), three prior serious felony convictions (§ 667, subd. (a)), and three prior prison terms (§ 667.5, subd. (b)). He was sentenced to a determinate term of 38 years<sup>2</sup> and an indeterminate term of 103 years to life in prison.

Defendant contends that (1) one of the prior serious felony convictions was improperly used to enhance the sentences on counts 1 and 3 because it was not “ ‘brought and tried separately’ ” from another of the prior serious felony convictions (§ 667, subd. (a)); and (2) the same prior convictions were improperly used for both the prior serious felony conviction enhancements and the prior prison term enhancements. The People concede as to both claims, and we agree.

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The sentencing minute order erroneously refers to a 53-year determinate term, presumably adding the 15-year-to-life term to the correct 38-year determinate term.

## I

### PROCEDURAL BACKGROUND<sup>3</sup>

The operative information alleged that defendant had three prior strike convictions which were also prior serious felony convictions. The three convictions stemmed from two cases, case Nos. INF031679 (one conviction) and INF032882 (two convictions). Both cases also served as the basis of allegations that defendant served a prior prison term, together with a third case. In a bifurcated bench trial, the court found all the underlying convictions allegations true.

At sentencing, the court sentenced defendant to 15 years to life in count 1, but then, pursuant to section 667, subdivision (e)(2)(A)(iii), increased the minimum term to 53 years to life by adding a 20-year enhancement for the personal and intentional discharge of a firearm, a consecutive five-year enhancement for each of the three prior serious felony convictions, and a consecutive one-year enhancement for each of the three prior prison terms. The court added two terms of 25 years to life for counts 5 and 6, for a total indeterminate term of 103 years to life. In addition to the indeterminate term, the court sentenced defendant to a determinate term of 38 years, consisting of the aforementioned enhancements. The court imposed a concurrent term of six years for count 4 and imposed and stayed a term of six years for count 3.

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<sup>3</sup> A discussion of the facts underlying defendant's conviction is not necessary to the resolution of the issues on appeal.

## II

### DISCUSSION

#### 1. Prior Serious Felony Convictions

Defendant contends that because two of the convictions used for the prior serious felonies arose from the same case, the court was only able to use one of them to enhance his sentence. Respondent concedes, and we agree, that one of the prior serious felony conviction enhancements must be stricken from both the indeterminate and determinate terms.

Section 667, subdivision (a), provides for a separate five-year sentence enhancement for every prior serious felony conviction “on charges brought and tried separately.” Where two charges were not brought separately, but were made in a single complaint, the court can only impose a single five-year enhancement for the two charges. (*In re Harris* (1989) 49 Cal.3d 131, 136-137; *People v. Jones* (2015) 236 Cal.App.4th 1411, 1415.)

Here, defendant had three prior serious felony convictions, but two of them arose out of the same case, case No. INF032882. Only one of those two could serve as the basis for a prior serious felony conviction enhancement, leaving a total of two separate prior serious felony conviction enhancements for the indeterminate and determinate terms, rather than three.

## 2. Prior Prison Term Enhancements

Defendant also contends that because the court imposed a prior serious felony conviction enhancement using the sole conviction in case No. INF031679, it could not also use the same conviction for one of the prior prison term enhancements. Respondent concedes, and we agree, that one of the prior prison term enhancements must be stricken from both the indeterminate and determinate terms.

The prison term stemming from a conviction which has been used for a prior serious felony conviction enhancement per section 667, subdivision (a), may not be used again for a prior prison term enhancement under section 667.5, subdivision (b). (*People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) Here, the conviction in case No. INF031679 could not be used for the one-year prior prison term enhancement on either the indeterminate or determinate term once it was already used for the prior serious felony conviction enhancement.

## 3. The Abstract of Judgment

This Court notes the following errors in the determinate abstract of judgment:

(1) The sentence on count 4 is for six years concurrent, instead of the stayed sentence currently indicated;

(2) The sentence on count 3 is for six years, stayed, instead of the consecutive sentence currently indicated;

(3) The determinate sentence is enhanced by 32 years consecutive, consisting of 20 years for section 12022.53, subdivision (c), on count 1, and the priors

enhancements—two five-year enhancements for section 667, subdivision (a), and two one-year enhancements for section 667.5, subdivision (b)—as described above, instead of the blank spaces currently indicated.<sup>4</sup>

### III

#### DISPOSITION

The judgment is modified to strike one of the five-year prior prison term enhancements and one of the one-year prior prison term enhancements for each of the indeterminate and determinate sentences, leaving a total indeterminate sentence of 97 years to life and a total determinate sentence of 32 years. The clerk of the superior court is ordered to prepare a corrected abstract of judgment, as indicated above. As modified, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

MILLER

J.

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<sup>4</sup> The error is in the complete lack of any determinate enhancements on the determinate abstract of judgment rather than a miscalculation.